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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1691

WAN SHIH HSIEH,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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The respondent in its brief in opposition to the petition for a writ of certiorari totally ignores petitioner's central argument that a statutory and regulatory scheme exists compelling consultation between the Immigration and Naturalization Service and the Department of State and requiring the INS to respond to inquiries of U.S. Consulates relating to the issuance of visas abroad.

In its brief in opposition, respondent cites a selected list of statutes and regulations to support the view that the responsibility of the INS vis-a-vis consul determination of immigrant visa applications is narrow, limited and above all discretionary. The position taken by respondent is to

set forth singular aspects of INS responsibility, thereby attempting to camouflage the interrelationship between INS and State Department actions. The argument of respondent does not confront the existence of a statutory scheme which envisions actions by the INS and the State Department in a complementary if not unified manner. The respondent avoids even the recognition of Section 105 of the Immigration and Naturalization Act which requires that the Justice and State Department:

> "shall maintain direct and continuous liaison with each other with a view to a coordinated, uniform and efficient administration of this Act, and all other immigration and nationality laws." 8 U.S.C. Section 1105.

The implications of the respondent's position are devastating. For the immigrant in the process of revocation proceedings, the absence of an affirmative duty by the INS to complete its investigative process must mean a denial of procedural rights, including the right to offer evidence and to appeal. Where as here a determination on preference petitions for children abroad will not proceed until the INS investigation is completed, years of delay without administrative or judicial recourse are the result. As the District Court stated,

> ". . . the position that INS is under no duty to conduct such investigation is inequitable and unreasonable. . . . if the INS is under no duty to complete its investigation, the plaintiff is in administrative limbo. The regulations cannot be read to permit such an administrative Catch-22." (21a)

The respondent's position that the INS is under no duty to act sanctions the dismantling of the statutory scheme, thereby prohibiting the efficient administration of the Immigration and Naturalization Act and giving approval to non-reviewability and potentially capricious treatment of any alien in the immigrant visa process.

Moreover, the respondent is disingenuous in its treatment of petitioner's claim of error by the District Court in dismissing the complaint for failure to establish that the INS abused its discretion or acted arbitrarily in investigating the alleged fraudulent procurement of permanent resident status by the petitioner. Petitioner's brief for writ of certiorari explicates the error by the District Court in dismissing the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure where the District Court accepted into its findings matters outside the pleadings. The better practice would have been to treat such a motion as one for summary judgment. Moreover, the District Court relied on, and accepted as true, an affidavit submitted by a Service employee which was disputed point by point by petitioner's affidavits. No showing was made by the Service that its actions in the instant case were reasonable. Petitioner contends that without such evidence being presented, the District Court could not have found that the Service established "without doubt" that their actions were "reasonable". (See Petitioner's brief pages 23-28.)

In response to petitioner's argument, the respondent asserts that "petitioner has shown no violation at all, much less the derrogation of a duty." (Respondent's brief, page 9.) The burden in a motion to dismiss rests, however, with the respondent to show that on the face of the pleadings, "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Haines* v. *Kerner,* 404 U.S. 519 (1972). Further, where summary judgment is appropriate "only the moving party is entitled to judgment as a matter of law, where it is quite clear that the truth is that no genuine issue remains for trial . . . the purpose of the rule is not to cut litigants off from trial by jury if they really have issues to try." *Sartor* v. *Arkansas,* 321 U.S. 620, 627 (1944).

The respondent in its answering argument shifts the burden to the petitioner and asserts as fact disputed allegations. The respondent evades dealing with the issue presented, that is whether the District Court erred in dismissing the complaint on the basis of a single affidavit submitted by the Service which was opposed in all respects by the petitioner. The District Court lacked a proper basis for dismissing petitioner's complaint.

The petition for a writ of certiorari should be granted.

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